Supreme Court, U. S.
FILED
JUL 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

Reply Brief of Appellee CALL to Appellant's Brief on the Issue of Mootness

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BATAVIA TIMES, APPELLATE COURT PRINTERS
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BATAVIA, N. Y. 14020
716-343-8457

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Appellees.

I.

The appellant is misdirecting this Court in an effort to make a case for mootness.

A.

The allegation by the appellant contained in the "Appellants' Brief on the Issue of Mootness", that the appellee CALL has concurred in the position of the appellees Graf and

Comerford regarding the implementation of the 1974 Charter rather than the 1972 Charter is utterly groundless. The inaccurate allegation against the appellee CALL is repeated throughout the appellants' brief on the subject (ps. 4, 6, 7, 9 and 11). In addition, the appellant imprecisely and repeatedly charges the "respondents" with abandoning the 1972 Charter (ps. 2, 3, 4, 5, 7, 11 and 13).

The appellee CALL has stated in the District Court consistently and in its brief in this Court that the judgment of the District Court must be complied with fully. The appellee CALL has pledged to vigilantly enforce the judgment of the District Court in all respects particularly the injunctive provisions of the decree enforcing the declaration of constitutional rights of the aggrieved voters.

B.

The circumstance of the certification of the 1974 Charter by the Secretary of State of the State of New York was first disclosed to the District Court and to the appellee CALL by the Niagara County Attorney on May 19, 1975 (motion for Stay; App. 1, Brief of Appellant on Issue of Mootness). The appellee CALL was asked to comment by the District Court (John T. Curtin U.S.D.J.). The District Court was advised that the appellee CALL would have no objection to the 1974 Charter being implemented as a successor charter if the District Court specifically authorized such action by an amendatory order in furtherance of the substantive equal suffrage rights declared by the District Court.

Thereafter, on the motion to vacate the judgment of the District Court on the ground of mootness (June 2, 1975), the appellee CALL stated that, in order to clarify the Charter question, it would request the District Court to authorize the implementation of the 1974 County Charter as a successor instrument to the 1972 County Charter in view of the voluntary

action of the New York Secretary of State: since such action was consistent with the declaration of rights and injunctive relief granted by the District Court (aff. of appellee F. Shedd, Appendix 5, p. 55, Brief of Appellant on Issue of Mootness). Such an application was contingent upon the certification of the 1974 County Charter by the New York Secretary of State achieving finality. Such finality has not occurred as a result of the proceeding under Article 78 CPLR commenced by the appellant on June 27, 1975, to void the certification by the Secretary of State.

II.

This Court should reject a result which deprives citizens of the prompt benefit of their fundamental constitutional rights.

The constitutional rights of the aggrieved voters, the Niagara County voters who voted in the majority for a Charter form of local government, have been in suspension since January 1, 1973. Their rights have been determined judicially in regard to the 1972 County Charter. The only Charter capable of immediate implementation is the 1972 Charter. The aggrieved voters are entitled to the earliest realization of their fundamental constitutional rights.

The aggrieved voters should not be deprived of the rights they have now achieved in the District Court. Only through the steady enforcement of the rights of the aggrieved voters which flow from the County Charter referendum will the aggrieved voters have the charter form of local government and the representation by an elected County Executive and County Comptroller to which they are entitled on January 1, 1976.

The State Court proceeding instituted by the appellant, to revoke and rescind the certification by the New York

Secretary of State of the 1974 County Charter on the ground that it violates the double majority provision of the New York Constitution, effectively precludes any present consideration of the 1974 County Charter as a valid and duly adopted successor instrument to the 1972 County Charter.

The appellant urges this Court to defer review of the constitutionality of Article 9 § 1(h)(1) of the New York Constitution until the final determination of the State Court proceeding.

The appellant's strategy is primarily dilatory and evasive. He is repetitiously attempting to enforce in the New York Courts the voting scheme based upon place of residence which the District Court, in this case, declared unconstitutional. Yet the appellant seeks to evade a review now in this Court.

III.

The concession by appellant in its final point that there is no evidence in this case to refute the invidious discrimination of the New York voting scheme based upon place of residence should be dispositive of this appeal in favor of the aggrieved voters.

The reliance of the appellant upon *Socialist Labor Party* vs. *Gilligan*, 406 U.S. 583, 92 S.Ct. 1716 (1972) and *Rescue Army* vs. *Municipal Court of Los Angeles*, 331 U.S. 549, 67 S.Ct. 1409 (1947), in which cases the Court dismissed the appeals because of prematurity and abstractness, is grasping at straws. The constitutional issue in this case was framed in the most clean-cut and concrete fashion in the complaint, was briefed fully by the appellee CALL and was central to the decision of the District Court (app. A, relevant paragraphs of plaintiff's amended complaint).

Conclusion.

There is no issue of mootness for this court to consider. The motion of the appellee CALL to affirm the judgment of the District Court should be granted.

Respectfully submitted,

WELLES V. MOOT, ESQ.,
and
JOHN J. PHELAN, ESQ.,
Attorneys for Appellees,
Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

July, 1975.

APPENDIX A.

Paragraphs VIII, IX, and X of the Plaintiff's Amended Complaint.

VIII

That the proposed Local Law No. 1, in relation to the adoption of a Niagara County Charter, was adopted by the Niagara County Legislature on September 6, 1972 and submitted to referendum pursuant to Art. 9, § 1 (h) (1) of the New York State Constitution. That said Niagara County Charter (Exhibit A, abstract) was proposed as the governing instrument for a unit of local government, the County of Niagara, having general governmental powers over the entire geographic area in which no specific group of voters, residents or other persons were primarily affected or interested as compared to another group. Within the geographic boundaries of said unit of local government having general governmental powers, there was contained 3 cities, 5 villages and 12 townships. The general governmental powers and the general responsibility for local government property and affairs to be carried out by the unit of local government to be adopted in the proposed county charter and by the terms of the county law and relevant applicable statutes, were, among others, to set a tax rate, to equalize assessments, to issue bonds, to prepare a budget for the county's needs and to make long term judgments about the way Niagara County should develop—whether industry should be solicited, roads improved, recreation facilities built. The functions to have been performed by said county government pursuant to the proposed Niagara County Charter were to have affected all the residents of Niagara County uniformally and equally. The proposed county charter government, through the county executive and the county comptroller to have been elected pursuant thereto (See Exhibit A attached), contained

authority to make substantial numbers of decisions affecting all citizens, whether they reside inside the limits of the three cities of Niagara County or in the areas outside of the cities within Niagara County. The county charter government would have maintained buildings, administered welfare services, enforced environmental laws, maintained and improved roads, provided health care and drainage and refuse disposal, mental health services and county planning. Real property taxes were to be levied and equalized upon real property in the county. The operating and capital budget expenditures were assessed uniformly upon all the taxpayers of the entire geographic unit. Finally, by the terms of said charter the terms of office of the members of the Niagara County Legislature were extended to four year terms.

IX

The provisions of Art. 9, § 1 (h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Laws of New York*, § 33(7), which require that (1) no charter or other alternative form of county government or (2) any such form of county government that transfers functions of the cities, towns, villages, districts or other units of government, including the county, to each other or (3) any such form of county government that abolishes one or more offices, departments, agencies or units of government may become effective unless approved on a referendum by a majority of the votes cast in the cities of the county voting as a unit and in the area outside the cities of the county voting as a separate unit is an unconstitutional deprivation of the right of the plaintiff Shedd and other members of the class to the equal protection of the law pursuant to the Fourteenth Amendment in that it

violates the principle of equal representation for equal numbers of people without regard to race, sex, economic status or place of residence within the state.

X

The provisions of Art. 9, § 1 (h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York, *35C McKinney's Cons. Laws of New York, § 33(7),* which create classifications of voters in each of the counties of the State of New York without any rational justification thereof, without any articulated and permissible state goal and limit the voting franchise of the plaintiff and other members of the class without defining the interests promoted or demonstrating a compelling state interest, constitute a *prima facie* unconstitutional dilution or debasement of the vote of the plaintiff and members of the class based upon the *prima facie* classification in units of voters by reason of their residence in the cities of the county or in the area outside of the cities of the county. A chart of the population of New York State located within the cities of each county and in the area outside of the cities is annexed to the within complaint and designated Exhibit B. Said Exhibit B demonstrates graphically that the classification in the New York State Constitution of voters based upon their residence within the cities or in the area outside of the cities create unequal population voting units but not consistently in favor of city residents or non-city residents but rather creates unconstitutional voting power in favor of resistance to change, in favor of historical rigidity and in furtherance of suspect classification based upon race, sex, economic status and location of residence within the state. The classification deprives this plaintiff and others similarly situated of their constitutional right of equal

representation in the determination of forms of local government of a general governmental nature and of the opportunity to elect public officers to exercise executive and legislative powers of a general governmental nature as a result of the change of the form of said unit of general purpose local government.